Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1731

ROY DAVISTON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STANTON D. LEVENSON
1615 Frick Building
Pittsburgh, PA 15219
(412) 355-0650
Attorney for Petitioner

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on May 11, 1978.

CITATIONS TO OPINION BELOW

The judgment order of the Court of Appeals is not yet reported and is reprinted in Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1978. A timely Petition for Rehearing en banc was filed and denied on May 11, 1978. The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

QUESTION PRESENTED

Were the trial court's conspiracy instructions erroneous where they did not clearly state the relevant legal criteria, could easily have misled the jury, constituted an improper amendment to the indictment and prevented Petitioner from making a proper closing argument to the jury?

STATEMENT OF THE CASE

In July of 1975, agents of the Drug Enforcement Administration began the investigation in this case (187a). On October 19, 1975, an application was filed with the district court seeking the authority to intercept wire communications of Martel Inmon who was believed to be a large-scale heroin dealer. On that date, the court authorized a twenty-day wiretap (171a). A subsequent twenty-day wiretap of Inmon's phones was authorized on March 16, 1976 (172a).

On July 14, 1976, the government brought a twenty-eight count indictment against ten individuals, including the Petitioner, charging them with an assortment of federal narcotics violations. Specifically, the Petitioner was charged in five counts with conspiracy (Count One), possession with intent to deliver heroin (Counts Eighteen and Twenty-eight) and use of a telephone to facilitate the unlawful distribution of heroin (Counts Fifteen and Twenty-five).

On November 9, 1976, after extensive pre-trial proceedings, the case came on for trial before the Honorable Maurice B. Cohill, Jr. and a jury. Prior to trial, the charges against defendants Steptoe and Calvin Clark were dismissed, and the remaining defendants all pled guilty.

The government's entire case against the Petitioner was based upon the evidence disclosed by the court-authorized interceptions. Prior to submission of the case to the jury, the court granted Petitioner's motion for a judgment of acquittal with regard to the possession counts (583a).

On November 17, 1976, the jury found the Petitioner guilty of the three remaining counts. On September 23, 1977, the Petitioner was sentenced to three years' imprisonment and fined $2,000.00.

REASONS FOR GRANTING THE WRIT

The issue here involves erroneous jury instructions on the often difficult concept of conspiracy. It is beyond dispute that the first and most obvious function of jury instructions is to present the jury with the applicable law clearly, simply and concisely; and, that no matter how technically correct an instruction may be, it is nonetheless erroneous unless a jury can be made to understand it. As the Third Circuit recently stated:

> "The district judge is responsible for giving the jury the guidance by which it can make appropriate conclusions from the testimony. This duty is performed by clearly stating the relevant legal criteria. *Bollenbach v. U. S.*, 326 U.S. 607 (1946)." *U. S. v. Garrett, et al.*, (CA 3) —— F.2d —— Decided March 28, 1978.

Thus, instructions are erroneous where they fail to provide the jury with a clear grasp of the triable issues and the law applicable thereto. *Tyler v. Dowell, Inc.* (CA 10, 1960), 274 F.2d 890.

The Court of Appeals, by its decision in this case, has sanctioned such a departure by the district court from these principles as to call for the exercise of this Court's power of supervision.

Where the legal principles are complex, such as in a conspiracy case, the possibility that jurors, as laymen,

may misconstrue the evidence makes it mandatory that the court's instructions be particularly clear and understandable.

Here, the court's instructions were misleading, confusing, constituted an improper amendment to the indictment and prevented the Petitioner from making a proper closing argument.

In Count One of the indictment, the government charged a single over-all conspiracy involving eleven individuals. The conspiracy was alleged to have covered a seven-month period and had as its objective the distribution of heroin. Twenty-three overt acts in furtherance of the conspiracy were alleged.

Part of the court's conspiracy instructions were as follows:

> "Now, although the indictment charges a single conspiracy, Count One of the indictment, it would be possible to find more than one conspiracy, one relating to Martel Inmon and the Defendant, Roy Daviston, and others relating to Martel Inmon and other people. Whether there was one conspiracy, more than one conspiracy, or no conspiracies at all, is a factor for you to determine in accordance with these instructions. If you find beyond a reasonable doubt that there was a conspiracy in which Mr. Daviston participated in, you find him guilty; if you find him not involved in *any* conspiracy, you find him not guilty as to the conspiracy count." (616a, 617a) (Emphasis added)

Prior to his charge, the judge informed the parties that he intended to give the above instruction (584a). The Petitioner objected and also noted that the proposed

instruction would deprive him of arguing to the jury that he should be acquitted unless the government proved that he participated in the conspiracy alleged in the indictment (584a, 585a).

The judge stated the basis for his instructions as follows:

> "That is part of my thinking on the matter, and the other part is that this particular question which obviously has been a puzzle and a puzzlement for the courts since 1945, I feel it is something which has to be considered on a case to case basis, and whether you are ruling one way or the other is going to effect the substantive rights of the accused, that in this case after reviewing the evidence I have concluded that Mr. Daviston's rights are not substantively effected by giving the jury the option of finding there was a conspiracy limited to him and Martel Inmon or a conspiracy involving others, or one conspiracy, perhaps, with him and Mr. Inmon, and other conspiracies involving Mr. Inmon and others, and that is the basis for my ruling." (585a)

At the conclusion of the court's charge, Petitioner renewed his objection (619a), which was again overruled (620a).

The court, in effect, instructed the jury to convict the Petitioner if they found that he participated in *any* conspiracy and to find him not guilty *only* if they found him "not involved in *any* conspiracy." This instruction was misleading, confusing and erroneous.

Even if this charge was technically correct, the possibility that it would mislead and/or confuse the jury was enormous. The only conspiracy Petitioner could be

convicted of was that charged in the indictment. The Petitioner was entitled to have the jury instructed to that effect. Whether Petitioner was guilty of the conspiracy charged in the indictment was a pivotal issue. The judge's instructions could easily have been interpreted by the jury as permitting them to convict Petitioner without finding that he had participated in that conspiracy.

In addition, giving the jury what the court referred to as an "option" (585a) permitted a conviction upon a conspiracy charge significantly broader than the conspiracy alleged in the indictment. If an indictment is amended during trial, a conviction on charges other than those found by a grand jury violates the Fifth Amendment. *Stirone v. U. S.*, 361 U.S. 212, 80 S. Ct., 4 L.Ed.2d 252 (1960). The court in *Stirone* was concerned with the addition of charging language. It is evident that the instruction in question falls within *Stirone's* prohibition.

Thus, it is our position that the instruction was erroneous, even if technically correct, because it was misleading and confusing and increased the possibility that the jury would misconstrue the evidence upon this pivotal, complex and difficult issue. The instruction given materially affected Petitioner's substantive rights in that it constituted an amendment to the indictment which substantially broadened the conspiracy count. Finally, the instruction prevented Petitioner from arguing to the jury that he should be acquitted of conspiracy unless the government proved that he was a member of the conspiracy charged in the indictment. The cumulative effect of these errors resulted in a denial of due process and requires that the conviction be reversed.

CONCLUSION

We urge this Court to grant review because the conspiracy instructions of the district court denied Petitioner a fair trial. Even if the Court finds that the instructions were technically correct, they were nonetheless erroneous because of the substantial possibility that they confused and misled the jurors. Conspiracy is always a difficult concept to understand, and the instructions here could only have compounded that difficulty.

Respectfully submitted,

STANTON D. LEVENSON
1615 Frick Building
Pittsburgh, PA 15219
(412) 355-0650
Attorney for Petitioner

APPENDIX

Appendix A.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-2342

UNITED STATES OF AMERICA,
Appellee,
v.
ROY DAVISTON,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Crim. No. 76-140-9

Argued March 27, 1978
Before HUNTER, WEIS and GARTH, *Circuit Judges*

BLAIR A. GRIFFITH
DAVID B. ATKINS
EDWARD J. SCHWABENLAND
Attorneys for Appellee
STANTON D. LEVENSON
Attorney for Appellant

Appendix A.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, as follows:

1) The court below erred in refusing the defendant's Motion to Suppress Evidence Obtained through the Interception of Wire Communications where the issuing judge did not have a sufficient basis for his finding that normal investigative procedures had been tried and had failed or reasonably appeared to be unlikely to succeed if tried, or to be too dangerous;

2) The appellant's conviction for conspiracy must be reversed where the evidence was insufficient to connect him with the conspiracy alleged in the indictment; and

3) The court's conspiracy instructions were erroneous, constituted an improper amendment to the indictment and prevented the appellant from making a proper closing argument to the jury;

it is

ADJUDGED and ORDERED that the judgment of the district court be affirmed.

By the Court,
JAMES HUNTER, III, *Circuit Judge*

Attest,

BETTY J. ROBINSON
Deputy Clerk

Date April 11, 1978.

Supreme Court, U. S.
FILED
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No. 77-1731

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROY DAVISTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1731

ROY DAVISTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court's instructions constituted reversible error in that they permitted the jury to convict for a conspiracy not alleged in the indictment.

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of two counts of using a telephone to facilitate the unlawful distribution of heroin (Counts 15 and 25), in violation of 21 U.S.C. 843(b), and one count of conspiracy to distribute heroin (Count 1) in violation of 21 U.S.C. 846. Petitioner was sentenced to concurrent terms of three years' imprisonment and was fined $2,000. The court of appeals affirmed without opinion (Pet. App. A).

1. The indictment charged a single large-scale conspiracy consisting of Martel Inmon, petitioner, and several others, to distribute heroin in the Pittsburgh area. Inmon, the wholesaler, sold bulk shipments of heroin to several key distributors, including petitioner. The distributors in turn supplied the retail level "street pushers."

The evidence presented at petitioner's trial was limited to Martel Inmon and his key distributors; no other drug network or criminal operations were ever mentioned at trial. What was shown was that, on several occasions, petitioner had purchased large quantities of heroin from Inmon, a major heroin dealer in the Pittsburgh area, for amounts ranging from $18,000 to $25,000 per purchase. The evidence consisted chiefly of recordings of telephone conversations between petitioner and Inmon. The recordings included a discussion of the problems Inmon was experiencing in obtaining high quality heroin for petitioner from his supplier in California (Tr. 247); petitioner's description of the arrest of several of his own drug pushers (Tr. 325); petitioner's order for more heroin and quinine to dilute the substance to street value (Tr. 327-328); Inmon's statements that his other workers had high praise for petitioner (Tr. 330-331); and Inmon's offer of a portion of a large heroin shipment to petitioner for redistribution (Tr. 245-251). Petitioner also accepted Inmon's offer to broker a particularly large drug transaction for him, involving six to eight "pieces" of heroin at $18,000 per piece (Tr. 249).

2. Asserting that the evidence showed at most a conspiracy between Martel Inmon and himself, petitioner now assigns as error the following portion of the trial judge's instructions:

> Now, although the indictment charges a single conspiracy, Count One of the indictment, it would be possible to find more than one conspiracy, one

> relating to Martel Inmon and the Defendant, Roy Daviston, and others relating to Martel Inmon and other people. Whether there was one conspiracy, more than one conspiracy, or no conspiracies at all, is a factor for you to determine in accordance with these instructions. If you find beyond a reasonable doubt that there was a conspiracy in which Mr. Daviston participated in, you find him guilty; if you find him not involved in any conspiracy, you find him not guilty as to the conspiracy count (Pet. 5-8).

Petitioner contends that this instruction violated substantial rights in that "it constituted an amendment to the indictment which substantially broadened the conspiracy count" (Pet. 7). The claim is flawed.

On the one hand, the evidence was sufficient to support the charge of a single conspiracy of which petitioner was a member. Recordings of telephone calls from each member were introduced in evidence showing a large scale heroin distribution network with Martel Inmon at its center and various operatives at petitioner's level near the core of the conspiracy. Moreover, an inference of cooperation between the co-conspirators could be drawn from Inmon's offer to petitioner of as much of a particular shipment as he wanted before it was distributed among the rest of operatives, as well as Inmon's request that petitioner personally broker one of Inmon's large quantity sales to one of the operatives (Tr. 245-251). As the Third Circuit stated in *United States* v. *Klein*, 515 F. 2d 751, 753:

> [A] party who associates himself with an ongoing conspiracy may become a party to that agreement, either expressly by agreement or implicitly by acts done in furtherance of that conspiracy * * * By acting in furtherance of the co-conspirators' goals with knowledge of the improper purpose, the jury

> can reasonably infer that the new member has achieved a tacit agreement with members of the ongoing conspiracy.

See also *United States* v. *Agueci*, 310 F. 2d 817, 827 (C.A. 2), certiorari denied, 372 U.S. 959. On its facts, therefore, this case is wholly different from *Kotteakos* v. *United States*, 328 U.S. 750, 755, where "[t]he proof * * * admittedly made out a case, not of a single conspiracy, but of several."

On the other hand, if it be assumed that more than one conspiracy was established, the variance did not prejudice petitioner. See *Kotteakos* v. *United States, supra*, 328 U.S. at 765. As the Second Circuit has more recently put it in *United States* v. *Agueci, supra*, 310 F. 2d at 827:

> [T]he test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights. Fed. R. Crim. P. 52(a). *The material inquiry is not the existence but the prejudicial effect of the variance.* While we believe, as we have already stated, that the jury could find there was but one conspiracy, the finding of more than one conspiracy would not result in [any] prejudice * * * [emphasis added].

Here, petitioner makes no claim that he was entitled to a severance, or that evidence admissible only on a single conspiracy theory was used against him. In these circumstances, substantial rights were not adversely affected by any variance between indictment and proof. See *Berger* v. *United States*, 295 U.S. 78, 81-84.

Perhaps the district court ought not have expressly charged the jury that it might convict so long as it concluded that petitioner was party to a conspiracy, albeit one smaller than the single conspiracy alleged. But if a verdict so grounded is immune from challenge—because

the variance was insubstantial—the result cannot be different because the court explicitly permitted it. In the present context, the instruction was, at most, harmless error. Compare *Stirone* v. *United States*, 361 U.S. 212.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

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[1]In any event, concurrent sentences were imposed for the conspiracy and the substantive counts, the validity of which are not contested. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n. 4; *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

DOJ-1978-08